

Third District Court of Appeal Decision in Water Right Fee Litigation: *California Farm Bureau Federation, et al., v. State Water Resources Control Board*.

Litigation Status

Each year since the State Water Board first adopted emergency water right fee regulations in 2003, the Northern California Water Association and the Central Valley Project Water Association (co-plaintiffs hereafter referred to as "NCWA-CVPWA"), and the California Farm Bureau Federation (Farm Bureau) have sued the State Water Board and the State Board of Equalization over the water right fees. The plaintiffs allege, in part, that the fee legislation and the State Water Board's fee regulations are unconstitutional and invalid. The case went to trial in 2005, and the resulting trial court decision upheld the State Water Board's fees in their entirety. In January 2007 the Third District Court of Appeal (Appellate Court) issued a decision regarding the fees that the State Water Board adopted in Fiscal Year (FY) 2003-2004. The Appellate Court's decision partially overturns the trial court's 2005 decision. Activity on the litigation filed in subsequent years has been stayed pending the outcome of the litigation over the FY 2003-2004 fees.

Background

The State Water Board set the fees by regulation as required under a statute enacted by the Legislature in 2003. The Legislature anticipated that the federal government, and all others who claim sovereign immunity from State fees, might refuse to pay the water right fees. The Legislature thus incorporated into the statute the State Water Board's authority to pass through the fees to those who contract for water supply under a federally held water right. The Appellate Court upheld the fee statute in its entirety, including the "pass-through" provision, and rejected NCWA-CVPWA and Farm Bureau claims that the statute was unconstitutional and invalid. The Appellate Court, however, invalidated the State Water Board's regulations that establish the amount of annual fees that water right permit and license holders pay each year. The Appellate Court found that the State Water Board failed to adequately justify that the cost apportionment bore a fair or reasonable relationship to the fee payer's burdens on or benefits from the water right regulatory program. The Appellate Court invalidated the regulations that establish water right fees for the federal Central Valley Project's contractors and further concluded that the State Water Board was limited as to how much of the fees the Board could pass through to contractors. Nonetheless, the Appellate Court upheld the State Water Board's imposition of a minimum annual water right permit and license fee, and said that a minimum fee of \$100 "was not unreasonable."

Upon issuance of the Appellate Court's final decision (February 16, 2007 at the earliest), the State Water Board must adopt a new fee schedule for FY 2003-2004 within 180 days (August 15, 2007, at the earliest). The State Water Board also must determine, based on the revised fee schedule, whether it improperly assessed any fees in FY 2003-2004 and develop a formula for any refunds that may be due. The Appellate Court's remedy only authorizes those people who timely filed petitions for reconsideration with the State Water Board to be eligible for any such refunds. In sum, even though the Court requires the State Water Board to adopt new fee regulations, the State Water Board will continue to implement the existing statutory framework requiring the collection of fees.

## **Frequently Asked Question**

**1. Is this the final decision on the water right fees?**

No. The Appellate Court's decision will not be final until February 16, 2007, at the earliest,. Parties to the litigation may seek further review of the Appellate Court's decision.

**2. Will the State Water Board continue to assess water right fees?**

Yes. The Appellate Court upheld the statute that requires the State Water Board to collect water right fees. The Appellate Court, however, required the State Water Board to adopt a new fee schedule for FY 2003-2004 that reapportions the fees among various persons and programs such that they are consistent with the Appellate Court's ruling. The State Water Board will be focusing on that process in the upcoming months. At the same time, the State Water Board will begin developing a fee schedule for FY 2007-2008.

**3. Will I get a refund of the fees I paid in FY 2003-2004 if I didn't file a petition for reconsideration?**

The Appellate Court concluded that only people who filed a petition for reconsideration of the FY 2003-2004 fees are eligible to claim a refund.

**4. If I filed a petition for reconsideration of the FY 2003-2004 fees, will I get a refund of the entire amount of fees that I paid?**

Not necessarily. The Appellate Court's decision requires the State Water Board to determine the amount of fees that it improperly assessed and to establish a procedure for calculating refunds, if any, with 180 days of the Appellate Court's final decision. Accordingly, the State Water Board must adopt a new fee schedule and recalculate the fees before determining what refunds, if any, are due.

**5. Will I get a refund of the fees I paid in subsequent years?**

Once the State Water Board adopts a valid fee formula for FY 2003-2004, it will reevaluate the fee schedules for subsequent years. This process will take some time. It is unclear at this point when and if any refunds will be issued for the following years.

**6. What is the deadline for petitioning for reconsideration of the annual fees assessed on December 19, 2006?**

The deadline was January 18, 2007.

**7. What effect will the Appellate Court's decision have on future fees?**

Because the Appellate Court upheld the statute as constitutional, the primary impact on future fees of the Appellate Court's decision will be the reallocation among existing fee payers of the water right program costs that the Legislature decides each year should be fee-supported.